



DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

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21XS501520]

OSMRE Jurisdiction to Administer the Surface Mining Control and Reclamation Act of 1977 within the Exterior Boundaries of the Cherokee Nation Reservation and the Choctaw Nation Reservation in the State of Oklahoma

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of jurisdiction.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are notifying the public that the recent decisions of the Oklahoma Court of Criminal Appeals in *Hogner v. Oklahoma*, 2021 WL 958412 (Okla. Ct. Crim. App. March 11, 2021), and *Sizemore v. Oklahoma*, 2021 WL 1231493 (Okla. Ct. Crim. App. April 1, 2021)—which held that the historic Cherokee Nation of Oklahoma and the Choctaw Nation of Oklahoma Reservations, respectively, had not been disestablished—necessarily foreclose the State of Oklahoma’s authority to implement the Surface Mining Control and Reclamation Act of 1977 (SMCRA) on Indian lands within the exterior boundaries of the Cherokee Nation and Choctaw Nation of Oklahoma Reservations. This determination follows the recent decision of the United States Supreme Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which legally recognized the ongoing existence of the historic Muscogee (Creek) Nation Reservation in the State of Oklahoma and necessarily foreclosed the State of Oklahoma’s authority to implement SMCRA on Indian lands within the exterior boundaries of the Muscogee (Creek) Nation Reservation. As OSMRE stated in its recent notification regarding SMCRA jurisdiction on the Muscogee (Creek) Nation Reservation, SMCRA designates OSMRE as the sole

regulatory authority over surface coal mining and reclamation operations on Indian lands where a tribe has not obtained primacy. Consistent with the Supreme Court's decision in *McGirt*, Oklahoma may not exercise its State program regulatory authority over surface coal mining and reclamation operations within the exterior boundaries of the Cherokee Nation and Choctaw Nation of Oklahoma Reservations. Accordingly, for lands within the exterior boundaries of the Cherokee Nation and Choctaw Nation Reservations, OSMRE is the sole agency with jurisdiction over the SMCRA Title IV abandoned mine land (AML) reclamation and Title V regulatory programs. The Cherokee Nation Reservation consists of lands, wholly or partially within the following counties: Adair, Cherokee, Craig, Delaware, Mayes, McIntosh, Muskogee, Nowata, Ottawa, Rogers, Sequoyah, Tulsa, Wagoner, and Washington. The Choctaw Nation of Oklahoma Reservation consists of lands, wholly or partially within the following counties: Atoka, Bryan, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, McCurtain, Pittsburg, Pontotoc, and Pushmataha.

DATES: As of June 17, 2021, OSMRE notified Oklahoma of OSMRE's responsibilities under SMCRA Title IV and Title V programs within the exterior boundaries of the Cherokee Nation and Choctaw Nation of Oklahoma Reservations.

FOR FURTHER INFORMATION CONTACT: Alfred L. Clayborne, Regional Director (DOI Interior Regions 3, 4, and 6), Office of Surface Mining Reclamation and Enforcement, 501 Belle St., Suite 216, Alton, IL 62002; Telephone (618) 463-6463 Ext. 5101.

SUPPLEMENTARY INFORMATION

The decisions in *Hogner* and *Sizemore* both rely on the rationale of the United States Supreme Court in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Following *McGirt*, OSMRE evaluated Oklahoma's implementation of its approved regulatory program to identify any inconsistency with the *McGirt* decision. On April 2, 2021,

OSMRE sent letters to the Oklahoma Conservation Commission (OCC) and the Oklahoma Department of Mines (ODM) notify those agencies of OSMRE's responsibilities under SMCRA's Title IV and Title V program within the exterior boundaries of the Muscogee (Creek) Nation Reservation. OSMRE notified the public of its jurisdiction via *Federal Register* notice, published on May 18, 2021 (86 FR 26941).

Although *McGirt* expressly recognized the ongoing existence of only the Muscogee (Creek) Nation Reservation, in *Hogner* and *Sizemore* the Oklahoma Court of Criminal Appeals examined the relevant treaties and congressional acts and applied *McGirt's* reasoning to conclude that the Cherokee Nation and Choctaw Nation of Oklahoma Reservations had not been disestablished. The U.S. Department of Justice subsequently recognized that the Cherokee Nation and Choctaw Nation of Oklahoma Reservations had not been disestablished and has determined that the United States has criminal jurisdiction over major crimes committed within the boundaries of these reservations. As those reservations have not been disestablished, the lands within the exterior boundaries of the Cherokee Nation and Choctaw Nation of Oklahoma Reservations constitute "Indian lands" as defined by SMCRA, prohibiting the State of Oklahoma from exercising jurisdiction over surface coal mining and reclamation operations within the exterior boundaries of these reservations. On June 17, 2021, OSMRE sent letters to OCC and ODM notifying those agencies of OSMRE's responsibilities under SMCRA's Title IV and Title V programs within the exterior boundaries of the Cherokee Nation and Choctaw Nation Reservations. This notification began a coordination period to allow for the orderly transfer of all OCC and ODM records, documents, data, and other information associated with the regulation of activities under SMCRA within the exterior boundaries of the Cherokee Nation and Choctaw Nation of Oklahoma Reservations.

Pursuant to SMCRA, States may acquire the primary responsibility (i.e., primacy) for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within the State. To obtain primacy, a State must develop a regulatory and/or abandoned mine land program(s) that meets the minimum standards set forth in SMCRA and the Federal regulations, as approved by the Secretary of the Interior. SMCRA, however, does not allow for the delegation of this authority to a State to regulate surface coal mining and reclamation operations on “Indian lands” within the State’s boundaries. Unless a Tribe obtains primacy, SMCRA designates OSMRE as the sole regulatory authority over surface coal mining and reclamation operations on “Indian lands.” 30 U.S.C. 1300. SMCRA defines “Indian lands” as: “all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.” 30 U.S.C. 1291(9).

Potential Implications of Substitution of Federal Authority

SMCRA established the Abandoned Mine Reclamation Fund to receive reclamation fees that, along with funds from other sources, are used to finance reclamation of abandoned coal mine sites. Title IV of SMCRA authorizes OSMRE to provide grants to eligible States and Tribes that are funded from permanent (mandatory) appropriations. In general, recipients use these funds: to reclaim the highest priority AML coal mine sites that were left abandoned prior to the enactment of SMCRA in 1977; to reclaim eligible non-coal sites; for projects that address the impacts of mineral development; and for eligible non-reclamation projects.

Title V of SMCRA authorizes OSMRE to provide grants to States and Tribes to develop, administer, and enforce State and Tribal regulatory programs that address, among other things, the disturbances from coal mining operations. Additionally, upon

approval of a State or Tribal regulatory program, Title V authorizes a State or Tribe to assume regulatory primacy and act as the regulatory authority within the State or Tribe, and to administer and enforce its approved SMCRA regulatory program with oversight and backup enforcement authority provided by OSMRE. The regulations at Title 30 of the Code of Federal Regulations, Chapter VII, implement these provisions of SMCRA.

OSMRE will revisit and revise Oklahoma's regulatory and reclamation grants, as appropriate and consistent with OSMRE's assumption of regulatory and reclamation jurisdiction over Indian lands in Oklahoma.

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Deputy Director,

Office of Surface Mining Reclamation and Enforcement.

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